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Supreme Court of the United States.

OCTOBER TERM, 1957.

THE AMERICAN EMERY WHEEL WORKS,
Petitioner,

v.

WHIT MASON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

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Supreme Court of the United States.

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v.

WHIT MASON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the First Circuit (R.A. p. 233), entered in the above case on March 8, 1957, reversing an order of dismissal of the District Court of the United States for the District of Rhode Island (R.A. pp. 127-129).

Opinions Below.

The opinion of the District Court for the District of Rhode Island (R.A. pp. 127-129) does not appear in the Official Reporter and the opinion of the Court of Appeals (R.A. pp. 225-232) is reported in 241 F. (2d) 906. Both of these opinions are hereto appended and marked "Appendix A" and "Appendix B," respectively.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit sought to be reviewed was made and entered on March 8, 1957 (R.A. p. 233).

The jurisdiction of this court is invoked under 28 U.S.C. secs. 1254 (1) and 2101 (c), which permit a review by this court of cases in the Courts of Appeals by a writ of certiorari granted upon the petition of any party to any civil case after rendition of judgment, which petition shall be taken or applied for within ninety days after the entry of such judgment.

No motion for rehearing was sought in the Court of Appeals.

Question Presented.

Whether, in an action for negligence, based upon diversity of citizenship, the doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), was violated by the decision that a local precedent will be overruled (*a*) without any consideration of the local *stare decisis* rule, or the local jurisprudence, which compel a different result from that which the court below expressly predicated on general or federal law, and (*b*) without any finding of departure, inconsistency or criticism in the local law.

Statement of the Case.

This is a civil action for negligence, commenced in the United States District Court for the District of Rhode Island, brought by a citizen of Mississippi against a Rhode Island corporation, based upon diversity of citizenship. 28 U.S.C. sec. 1332 (a) (1). The complaint alleged, and

the evidence at the trial showed, that the plaintiff was injured by the disintegration of an emery wheel on February 10, 1953, while operating a bench grinder with an emery wheel attachment, in the scope of his employment by T. H. Pearce Company in Mississippi (R.A. 9, 10, 25).

The emery wheel which disintegrated was on the bench grinder when the plaintiff's employer purchased it from a Mississippi corporate distributor, Komp Equipment Company (R.A. 11-13). The bench grinder had actually been manufactured by the Hoover Company, a corporation in New Jersey, under the label of Miller Falls Company, a corporation in Massachusetts, which received the bench grinder from New Jersey and shipped it to the Mississippi corporation for sale in that state (R.A. 98, 99, 102, 103, 222, 223). The defendant Rhode Island corporation was one of two suppliers of emery wheels to the New Jersey corporation, which actually assembled the bench grinder (R.A. 83).

At the conclusion of the plaintiff's case the defendant made an oral motion to dismiss the complaint under Rule 41 (b) of the Federal Rules of Civil Procedure. In support of its position the defendant relied upon a decision of the Supreme Court of Mississippi which has not been overruled or modified or contradicted or criticized by any subsequent development in the law of Mississippi. The plaintiff argued that dicta in a later Mississippi case, which referred to the law in other states, should control as a binding exposition of current Mississippi law. The United States District Court for the District of Rhode Island granted the defendant's motion, in reliance on the unimpeached pronouncement of the highest court of Mississippi, and an order was entered dismissing the complaint (R.A. 127-129).

On appeal by the plaintiff to the United States Court of Appeals for the First Circuit, an opinion was rendered by

the court on March 8, 1957, vacating the order of the District Court in dismissing the complaint and remanding the case to the District Court of Rhode Island for further proceedings (R.A. 225-232).

Reasons for Granting the Writ.

In deciding that a local precedent will be overruled the court below erroneously measured the prospect of change by general rather than local law and made a conjectural inference, without warrant in any local expression. The erroneous method employed for the ascertainment of local law, and the kind of inference drawn, constitute errors, plainly shown by the opinion of the court below, which ought to be reviewed by this court.

It is undisputed, and clearly stated in the opinion of the court below, that the highest court in the controlling jurisdiction of Mississippi has made a pronouncement directly disposing of the question involved, provided that the pronouncement is still a part of the local law. Since it was the United States District Court for the District of Rhode Island which enforced the Mississippi precedent and the United States Court of Appeals for the First Circuit which denied enforcement of the Mississippi precedent, this determination of state law does not have the added weight which attaches to a local law exposition by local federal judges specially versed in that law.

Furthermore, the court below, lacking the presumed advantage of a special competence in the local law being declared, nevertheless expressly based its refusal to enforce the Mississippi precedent on the disposition of other jurisdictions to overrule precedents of theirs corresponding to the Mississippi precedent. This resort to general or federal law was not even prefaced by the slightest sug-

gestion of any examination or consideration of Mississippi's disposition to overrule its precedents, assuming that they were no longer favorably regarded there. And the decision of the court below does in substance assume that the highest court of Mississippi is dissatisfied with this precedent, because no local expression of dissatisfaction, even one implicit in a local inconsistency, or departure, is quoted, cited or referred to in the opinion of the court below.

The local precedent here involved was decided in 1928 and cited with approval in 1940. *Ford Motor Co.* v. *Myers*, 151 Miss. 73, 117 So. 362 (1928). *Gordy* v. *Pan American Petroleum Corporation*, 188 Miss. 313, 331, 193 So. 29, 34 (1940). The inference that it will be overruled is derived solely from a 1954 *dictum*, which simply made a brief reference to the law of other states and expressed no criticism, doubt or misgiving about the controlling local Mississippi law. *E. I. DuPont de Nemours & Co.* v. *Ladner*, 221 Miss. 378, 73 So. (2d) 249 (1954). In addition to the required recognition of the local jurisprudence, it is submitted that the nature of the *Erie* doctrine makes certain conditions essential for any permissible inference involving rejection of a local precedent. The ultimate inference of a local law char must be supported by certain preliminary findings expressly made. Since there should be a presumption favoring the validity of a local precedent, there must be evidence of inconsistency, departure or criticism in the local law and the indication of a change must be clear. The ultimate finding must be supported by substantial evidence in the local law. These requirements are logical corollaries of this court's insistence upon a cautious confinement to the origin of state created rights in the enforcement of them. None of these requirements are fulfilled in this case.

It is submitted that these errors ought to be reviewed by this court for any one of the following three reasons: (*a*) the important unsettled question of federal law which is involved should be decided; (*b*) the conflict between the opinion of the court below and decisions of this court should not be permitted; (*c*) an important question of local law has been decided in a way which conflicts with the applicable and ignored state law.

The standards, and the general essential conditions for the inference of a change in local law, present an important question in the administration of the federal doctrine of *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), which has not been, but should be, settled by this court. See *Bernhardt* v. *Polygraphic Co.*, 350 U.S. 198, 204, 205 (1956). The federal courts are burdened with an inordinate and disruptive uncertainty by the obligation to infer changes in local law without any authoritative guide for the manner of making the inference. Especially in connection with inferences of local law changes it is necessary for this court to direct that local law inferences be disciplined by conformity with the local jurisprudence. Without such direction, and by the example of this case, the *Erie* doctrine is practically reversed and completely subverted by an incomplete application. The pre-*Erie* evils of forum shopping are revived by the opportunity to achieve a different result through the application of state law according to a federal jurisprudence. The accommodation of that doctrine to the changing laws of the several states is a matter of the greatest magnitude. The federal courts have great need for this court to provide definite interpretative guides for the ascertainment of the organic law of the several states. See *Paul Revere Life Ins. Co.* v. *Stanfield*, 151 F. (2d) 776 (10 Cir. 1945). Also compare the method employed in *Adam Hat Stores, Inc.*, v. *Lefco*, 134 F. (2d) 101, 103 (3 Cir. 1943), and *United States* v. *Jones*, 229 F. (2d)

84, 86 (10 Cir. 1955), with that in *Kansas City Life Ins. Co.* v. *Wells*, 133 F. (2d) 224, 228 (8 Cir. 1943).

Furthermore, it is submitted that the decision of the court below has implicitly interpreted that doctrine in a way which conflicts with the *Erie* case and with the intimations of related decisions of this court. The entire local law was not applied. See *Bernhardt* v. *Polygraphic Co.*, *supra*, at 209-212; *West* v. *A. T. & T. Co.*, 311 U.S. 223, 237, 238 (1940); *Wichita Co.* v. *City Bank*, 306 U.S. 103, 107 (1939). Given the obligation to search for pronouncements from even intermediate state courts, *West* v. *A. T. & T. Co.*, *supra*, it seems anomalous for this lower court not to consider Mississippi jurisprudence, an integral part of the local law. As a result, the court below has decided an important local rule in a way in conflict with applicable state law.

It is therefore these errors which are presented for review by this court: (1) the method chosen by the court below, its express reliance on general law to the exclusion of the contrary local law, in assessing the likelihood that the local precedent will be overruled; and (2) the additional disregard of state law and the federal standards necessary for its ascertainment, implicit in the unfounded determination of local dissatisfaction with a local rule based only on a discovered local awareness of the currency of the contrary rule elsewhere.

The administration of the doctrine of *Erie R. Co.* v. *Tompkins*, *supra*, requires adherence to standards for state law determination which are appropriate to the effectuation of the constitutional and congressional distribution of judicial power in our federal system. This court has refused to subordinate doctrinal considerations in order to ease the burden of ascertaining state law, by directing the federal courts ". . . to ascertain from all the available data what the state law is and apply it rather

than to prescribe a different rule, however superior it may appear from the viewpoint of 'general law.'" *West* v. *A. T. & T. Co.*, 311 U.S. 223, 237 (1940). It is submitted that there is great need for an equally clear direction to include among the available data of a particular state the criteria developed in that state for the assessment of precedents, as well as the precedents themselves.

The court below has inferred that an expressly adopted and recently affirmed judicial rule of Mississippi no longer pertains in that jurisdiction because the Mississippi court more recently indicated "its awareness of the modern trend," which is contrary to the adopted judicial rule of Mississippi. It is submitted that this conjectural result was reached by the use of an erroneous method for the determination of state law: The lower court did not consider the jurisprudence of Mississippi and whether or not it contains a judicial tradition of adherence to precedents, leaving changes to the legislature, but, instead, the court guided its interpretation by the assertion that—

> "*MacPherson* v. *Buick Motor Co.*, supra, started a new trend in this particular field of the law, and its substantive result has found favor in § 395 of the American Law Institute Restatement of Torts. If the Supreme Court of Mississippi had recently reconsidered the rule it applied in *Ford Motor Co. v. Myers*, supra, and had decided to adhere to it on the ground of stare decisis, no doubt the federal courts would have had to accept the local law as so declared. But it would be gratuitous and unwarranted to assume that the Supreme Court of Mississippi would now so hold, when we bear in mind the readiness of other courts, in conservative jurisdictions at that, to overrule their earlier holdings and to bring their jurisprudence into accord with what is now the overwhelming weight of authority."

This approach to the federal court obligation to ascertain state law is completely unrelated to the available data on local law. Whether the federal court was warranted to assume that local law has changed depends first on the local jurisprudential criteria for making a change by judicial decision and secondly upon the local expressions indicating a change. It is not enough to ascertain that a local rule has not been recently reconsidered in the light of *stare decisis*. The important examination is to ascertain what the local *stare decisis* is, for the local *stare decisis* governs, not the general or federal notions on the subject.

The significance of the local *stare decisis* in this case is emphasized by the fact that the critical local precedent rejected by the court below was based upon the local *stare decisis*:

> "Appellee relies on decisions of courts of other jurisdictions, which hold that the manufacture of appliances which will become highly dangerous when put to the uses for which they are intended, because of defects in their manufacture, owes the public a duty, irrespective of any contractual relation to use reasonable care in the manufacture of such appliances. As stated, our court has held to the contrary, as shown in the decisions above cited."
>
> *Ford Motor Co.* v. *Myers*, 151 Miss. 73, 78, 117 So. 362, 363 (1928).

As pointed out in the concurring opinion of the lower court's decision, the case of *MacPherson* v. *Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), which "started a new trend in this particular field of the law," was approximately twelve years old when it was "considered and rejected by the Mississippi Supreme Court sitting in the *Ford* case." *Mason* v. *American Emery Wheel Works*, 241

F. (2d) 906, 910 (1 Cir. 1957). The stated reason for Mississippi's refusal to adopt the "new trend" was a *stare decisis* determination.

The local policies of stability and orderly processes of change in local law, contained in the local judicial doctrine of *stare decisis*, ought to be examined and given great weight by the federal courts before making any inference of a change in local law. The local jurisprudence must be consulted in order to ascertain whether an intimation of a local court is a "clear and persuasive indication that its pronouncement will be modified, limited or restricted." *West* v. *A. T. & T. Co.*, 311 U.S. 223, 236 (1940). It is the local law which must supply a readiness to overrule precedents without insisting on a change by legislation. It is the local law which must determine what factors, if any, may contribute to the erosion of a rule, and the relevance and significance of such factors as the age of a rule, the consistency and steadiness of its application, its merit as an original proposition, and its operation under changed circumstances. The likelihood of reconsideration of a rule must be judged by locally recognized reasons for such a reconsideration and by the local process for any such reconsideration, whether undertaken abruptly or by a gradual deliberate criticism. Finally, it is the local law which must give value to dictum, prescribing whether and when it may be considered as the opinion of the court rather than the expression of an individual.

Less than three decades is a short life span for a substantive rule of law. Measured by the jurisprudence of Mississippi, as it must be measured, it is an intolerably short span of life. Apart from any local imperative on the necessity for legislative intervention in order to cut so short the life of a rule, there is to be considered and enforced the local law's command that change of substantive rules be sought in the legislature. See *Ensminger* v.

Ensminger, 222 Miss. 799, 77 So. (2d) 308 (1955). The abruptness of a change, the absence of departure from established principle, must be weighed on local scales. In Mjssissippi the absence of departure carries great weight in the operation of a local rule which strongly insists upon adherence to precedent. See *Ensminger* v. *Ensminger*, *supra*; *Rainey* v. *Horn*, 221 Miss. 269, 280, 72 So. (2d) 434, 438 (1954). Conversely, a dictum is locally insignificant because the jurisprudence of Mississippi classifies it as more the expression of an individual writer than the opinion of the court. See *Fish & Oyster Co.* v. *First Nat. Bank*, 166 Miss. 162, 173, 146 So. 116, 119 (1932); *State* v. *Tingle*, 103 Miss. 672, 678, 60 So. 728, 729 (1912).

There is no indication that the Mississippi court has been unmindful of its rule these past three decades.

> "Under the views which we have hereinbefore expressed we deem it unnecessary to discuss the cases of . . . and *Ford Motor Co.* v. *Myers*, 151 Miss. 73, 117 So. 362, relied upon by the appellee, petroleum corporation, wherein no duty was owed by the defendant to the plaintiff under the facts thereof, and which do not deal with highly inflammable and dangerous substances placed on the market by the seller as its own product and under a name which would indicate that it was not inherently dangerous."
>
> *Gordy* v. *Pan American Petroleum Corporation*, 188 Miss. 313, 331, 193 So. 29, 34 (1940).

The court below has inferred a change during a fourteen-year period subsequent to this expression of local law in 1940. That inference is based exclusively on a decision which held that there was no common law negligence liability arising out of a violation of the federal Food, Drug and Cosmetic Act, because as a matter of law, there was no

proximate cause. *E. I. DuPont de Nemours & Co.* v. *Ladner*, 221 Miss. 378, 73 So. (2d) 249 (1954). This opinion adverted to the original American rule and the subsequent rule adopted by other jurisdictions, pertaining to manufacturers' negligence liability to consumers, without commenting on the original rule which had been adopted in Mississippi, although eight Mississippi cases involving operation of the rule were cited with apparent approval. The opinion unequivocally asserted that the particular issue with regard to the manufacturer's duty was whether the locally established exception to the local general rule should be applied to permit recovery, and the Mississippi court stated that it was the applicability of this exception which was urged upon the court. The ground of the court's decision made it unnecessary to decide the applicability of the exception.

The abruptness of the departure from precedent inferred by the court below is more striking in view of a Mississippi holding just two years before, that an employee could recover from his employer's consignor for injuries caused by a negligently loaded shipment of goods to his employer, because the employment status provided the privity relation necessary for recovery, with reliance being placed upon an old English decision. *American Creosote Works* v. *Harp*, 215 Miss. 5, 60 So. (2d) 514 (1952).

Thus, apart from the governing implications of the *Erie* doctrine, even the Mississippi decisions bearing upon manufacturers' liability for negligence, including the two decisions considered and discussed in the opinion of the court below, suggest the necessity for insistence upon an examination of the fabric of local law in order for a federal court to ascertain the strength of a particular thread in that fabric. It is a living law which must be applied in this case, but it is the living law of Mississippi, not that of New York, nor of other jurisdictions, conservative or oth-

erwise, nor of the Restatement. A readiness to overrule earlier holdings cannot be inferred simply from an awareness of change elsewhere or even from a preference for the change. It depends on a judgment of the proper legal manner in which to effect change. The readiness of other courts to overrule their earlier holdings is not relevant and is contrary to the process of change established by the jurisprudence of Mississippi.

The enforcement of local substantive rules in the federal courts must not be subjected to the exigencies dictated by an appraisal of their merits, if the integrity of the *Erie* doctrine is to be maintained. The District Court "reluctantly" enforced Mississippi's "harsh rule," as emphasized in the opinion of the Circuit Court, not because the merits of the rule, also emphasized in the Circuit Court opinion, were unappreciated, but rather because the deeper considerations imposed by the federal judicial system compelled a proper ordering of those merits. It is precisely when the merits of a substantive local rule do not commend it to the federal court that the constancy of the judicial standards for ascertainment becomes urgent. Only then does the problem of this case arise. It is the enforcement of an unpopular rule which demands that appropriate standards be fixed and applied.

In predicting that "the Supreme Court of Mississippi will declare itself in agreement with the more enlightened and generally accepted modern doctrine" the lower court erroneously applied a state common law rule according to standards of a federal common law. It erroneously refused to evaluate Mississippi precedents according to Mississippi law. This error strikes at the heart of the *Erie* doctrine and should not be allowed to stand uncorrected.

Furthermore, this error is compounded by another equally serious one. It is not alone the disregarded local

jurisprudence, and the different result that it compels, which warrants review by this court. Additional direction is needed, beyond the command to include the entire local law among the availiable data utilized in the ascertainment of local law. This case presents for the consideration of this court not only the scope of inquiry required by the *Erie* doctrine for the ascertainment of state law, but also the basic standards required for drawing conclusions from that inquiry. It seems clear that a local precedent cannot be ignored simply because the judicial rule it embodies is generally outmoded elsewhere. It is the local law which must yield indication of a change. *Bernhardt* v. *Polygraphic Co., supra.* Moreover, if that indication is derived from any local judicial expression, then it must be clear and convincing. See *West* v. *A. T. & T. Co., supra,* at 236.

In this case the conclusion of the court below that the local precedent will be overruled is not based upon any local judicial expression criticizing the local rule. Nor is the conclusion based upon any inconsistency or departure discovered in the local law by the extremely limited examination of the court below. This much is clear simply from reading the opinion of the court below. That opinion reveals unmistakably that the court's conclusion is based entirely and exclusively, not on one local dictum critical of the local rule, or commending the contrary rule, but on one local dictum simply referring to the contrary rule, which the court below construes as an apparent approval. Not one local expression on the merits of either rule is offered in that opinion to support the conclusions of the court. Nor can any such expression be found in the local law. Under these circumstances, the court's conclusion is not merely conjectural, unwarranted and without any foundation in the local law, but, more importantly, it clearly conflicts with the standards for the ascertainment of a change in local law, which are inherent in and essen-

tial to the administration of the *Erie* doctrine. See *Bernhardt* v. *Polygraphic Co., supra; West* v. *A. T. & T. Co., supra.*

It is submitted that, since there should be a presumption in favor of the validity of a local precedent, there must be a clear contrary indication expressed in the local law before any federal court may refuse to enforce the local precedent. A suspicion that a local precedent will be overruled is just as objectionable as a complete disregard of the local law when a federal court refuses to enforce a local precedent. The clear and convincing indication contrary to the local precedent must be expressly founded on the local law, with a substantial basis in the local law. Without these standards to guide the ascertainment of local law, its application by the federal courts acquires a discretionary character which makes conformity unnecessarily illusory. Judged by these standards, the error in the preliminary determination of the local law in this case is clear.

Conclusion.

The petitioner submits that, where this important and unsettled question of the appropriate standards essential to the administration of the *Erie* doctrine is presented in this context of the local precedent rejected, contrary to the ignored local jurisprudence, certiorari should be granted.

Respectfully submitted,

AMERICAN EMERY WHEEL WORKS,
By its Attorney,
FRANCIS V. REYNOLDS,

RICHARD P. MCMAHON,
Of Counsel.

Appendix A.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND.

I am frank to say, gentlemen, I have given this matter a lot of thought and I am deeply conscious of the fact that this is an extremely important case from the standpoint of the plaintiff and from the standpoint of the defendant. Perhaps in an abstract sense it is conceivably of more importance to the plaintiff.

As I see it, sitting as a federal court, it is my duty under the doctrine of *Erie v. Tompkins* to follow the state decisional law if there is any decisional law of the courts of last resort of the state where the tort occurred. Clearly under the *Trowbridge* case, this being a situation where the jurisdiction of this Court is based on diversity of citizenship and the existence of a controversy in the required jurisdictional amount, I must first look to see what law applied.

The conflict of law rules of Rhode Island certainly would dictate that the law of Mississippi where the alleged tort occurred shall govern.

Now counsel have cited to me several cases from a court of last resort in the State of Mississippi. This is not a situation where the Court is without clear indication, it seems to the Court, of what the Mississippi law is. I am not called upon to read dicta and try to predict what the court of last resort of Mississippi would do. It seems to me that the position of the Supreme Court of Mississippi is clear. It is unlike the situation presented in the case of *Trowbridge v. Abrasive Co. of Philadelphia*, reported in 190 F.2d 825, where the court says in the absence of any decisions to the contrary it would assume that the doctrine

of the case of *MacPherson v. Buick Motor Co.* was the law of Oregon because of its generally wide acceptance, and the court states in its opinion in that case at Page 828:

> "* * * Hence, in the absence of any decisions to the contrary, we assume it to be the law of Oregon that there is a duty on a manufacturer of a chattel to use reasonable care in manufacturing whenever there is an unreasonable risk that the chattel, if defectively made, will cause substantial harm."

Citing Restatement, Torts, Section 395.

I am frank to say if this were an original question before this Court, I certainly would not follow the doctrine which seems to me to be the law of Mississippi. But I feel, after considerable research of my own and consideration of this problem, that the Supreme Court of Mississippi in the case of *Ford Motor Co. v. Myers*, reported in 117 So. 362, although it was decided in 1928, has clearly indicated that Mississippi is one of those states which refuses to impose liability on a manufacturer for defects and negligence in the manufacture of appliances by it which can be and will become highly dangerous when put to the uses for which they are intended, where there is no contractual privity or privity of contract between the user and the manufacturer.

I think that the rule, as enunciated by the Supreme Court of Mississippi, is a harsh rule and I think it is contrary to the great weight of authority. But as I see the authorities and as I view my position in this matter, it being not an original question for me, I feel that I am bound by the decision of the Supreme Court of Mississippi in *Ford Motor Co. v. Myers*. For that reason I will reluctantly grant the motion to dismiss.

The defendant's motion to dismiss is granted.

Appendix B.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 5168

WHIT MASON,
Plaintiff, Appellant,

v.

THE AMERICAN EMERY WHEEL WORKS,
Defendant, Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND.

Before Magruder, Chief Judge, and Woodbury and Hartigan, Circuit Judges.

OPINION OF THE COURT.

March 8, 1957

Magruder, Chief Judge. Whit Mason, a citizen of Mississippi, filed his complaint in the United States District Court for the District of Rhode Island against The American Emery Wheel Works, a Rhode Island corporation. The case was one in tort for personal injuries alleged to have been suffered by the plaintiff in Mississippi as a result of negligent misfeasance by the defendant in putting out in commerce without adequate care and inspection, a dangerously defective emery wheel. According to the allegations of the complaint, at some time prior to the date of the accident defendant negligently manufactured, inspected and tested a certain emery wheel designed for

attachment to a bench grinder; that due to such negligence the emery wheel was not reasonably fit for the use for which it was intended, but on the contrary subjected to a risk of personal injury all persons lawfully using a bench grinder with the emery wheel attached; that on February 10, 1953, the plaintiff, while in the scope of his employment by T. H. Pearce Company, Forrest County, Mississippi, was operating a bench grinder with an emery wheel attachment manufactured by the defendant; that the said emery wheel, while being so used, did disintegrate and shatter, inflicting serious bodily injury to the plaintiff as a proximate result of defendant's said negligence.

On the face of the complaint it did not specifically appear that plaintiff was not in privity of contract with defendant. The answer of defendant, in addition to denying negligence, and denying that it had manufactured the particular emery wheel which had caused plaintiff's injuries, also set forth as a "First Defense" that the complaint failed to state a claim upon which relief might be granted, and as a "Fourth Defense" that the defendant "owed no duty to the said plaintiff as there is no privity of contract between the plaintiff and the defendant."

The case came up for trial before a jury. Plaintiff's evidence tended to show that a certain emery wheel, supposed to withstand a rotation speed of 3600 r.p.m., was purchased by the Hoover Company, a New Jersey corporation, from the defendant for attachment to a bench grinding machine made by the Hoover Company; that the Hoover Company affixed to the said bench grinding machine, with emery wheel attached, a label indicating that the bench grinder had been manufactured by Miller Falls Company, a Massachusetts corporation; that said bench grinder, having been packed in a crate, and without being removed therefrom, was successively sold by the Hoover Company to Miller Falls Company, by the latter to Komp

Equipment Company, and finally by Komp Equipment Company to T. H. Pearce Company, the plaintiff's employer; that the said grinding machine was unpacked from its original package and affixed to plaintiff's work bench; that while plaintiff was using it in the ordinary and proper manner the emery wheel disintegrated and exploded in plaintiff's face, causing the injuries complained of.

At the conclusion of the plaintiff's case defendant made an oral motion to dismiss the complaint under Rule 41 (b) of the Federal Rules of Civil Procedure. This motion to dismiss was granted by the district court, and an order was entered dismissing the complaint, from which the present appeal was taken.

Since the injury was inflicted in Mississippi, the district court, no doubt correctly under now familiar authorities, deemed itself to be obliged to apply the Mississippi local law to determine the tort liability, if any, of a manufacturer to one not in privity of contract with him. See *Trowbridge v. Abrasive Co. of Philadelphia*, 190 F.2d 825, 827-28 (C.A. 3d 1951). The district court came to the conclusion "reluctantly" that it was bound by the Mississippi law as declared in *Ford Motor Co. v. Myers*, 151 Miss. 73, 117 So. 362 (1928); that the "harsh rule" of Mississippi as so declared, "contrary to the great weight of authority" elsewhere, was that a manufacturer was not liable for negligence in the manufacture of appliances which could and would become highly dangerous when put to the uses for which they are intended, where there is no privity of contract between the user and the manufacturer.

Ford Motor Co. v. Myers, supra, was the only Mississippi case relied upon, or even referred to, by the district court. In that case the Supreme Court of Mississippi, in a half-page opinion, did in fact apply what was at one time the prevailing rule, in holding that Ford Motor Company as the manufacturer of a truck owed no duty of care to a

remote subvendee of the truck who was injured when the truck collapsed and plunged into a ditch because of a defect which could have been detected by reasonable inspection by the manufacturer before the vehicle left the factory.

At a time when the federal courts were applying their own notions of the federal common law of torts, under *Swift v. Tyson*, 41 U.S. 1. (1842), the court in *Huset v. J. I. Case Threshing Machine Co*., 120 Fed. 865, 868 (C. A. 8th, 1903), declared as a general rule that "a contractor, manufacturer, or vendor is not liable to third parties who have no contractual relations with him for negligence in the construction, manufacture, or sale of the articles he handles." At this late date it is hardly necessary to spend much time on the merit or justification for that supposed general rule. As was stated in 49 Harv. L. Rev. 1050 (1936), Sanborn, J., in *Huset v. J. I. Case Threshing Co.*, supra,

> "took as his starting point the supposed general principle that a manufacturer is not liable to third persons, not in privity of contract with him, for bodily injuries resulting from his negligence in manufacturing the article. He was confronted with decided cases imposing liability, in favor of third parties not in privity of contract, upon negligent manufacturers of drugs, foodstuffs, explosives, firearms. These cases he treated as falling within an exception, expressed in a conglomerate formula designed to cover them and no other: '. . . an act of negligence of a manufacturer or vendor which is eminently dangerous to the life or health of mankind, and which is committed in the preparation or sale of an article intended to preserve, destroy, or affect human life, is actionable by third parties who suffer from the negligence.' Cardozo, J., in *MacPherson v. Buick Motor Co.*, (217 N. Y. 382, 111 N. E. 1050 (1916) convincingly argued that these

> so-called exceptions were merely prime illustrations, and by no means the only ones, of the more basic principle of torts that actors generally, including manufacturers, have a duty of care not to create unreasonable risks of bodily injury to others within the zone of foreseeable danger."

MacPherson v. *Buick Motor Co.*, supra, started a new trend in this particular field of the law, and its substantive result has found favor in § 395 of the American Law Institute Restatement of Torts. If the Supreme Court of Mississippi had recently reconsidered the rule it applied in *Ford Motor Co. v. Myers*, supra, and had decided to adhere to it on the ground of stare decisis, no doubt the federal courts would have had to accept the local law as so declared. But it would be gratuitous and unwarranted to assume that the Supreme Court of Mississippi would now so hold, when we bear in mind the readiness of other courts, in conservative jurisdictions at that, to overrule their earlier holdings and to bring their jurisprudence into accord with what is now the overwhelming weight of authority. See, for instance, *Carter v. Yardley & Co. Ltd.*, 319 Mass. 92, 64 N.E. 2d 693 (1946). In *Anderson v. Linton*, 178 F.2d 304 (C.A. 7th, 1949), the court of appeals declined to accept as the local law of Iowa what it narrowly construed to be a dictum of the Supreme Court of Iowa enunciating the old ruling of nonliability in *Larrabee v. Des Moines Tent & Awning Co.* 189 Iowa 319, 178 N.W. 373 (1920). The Court of Appeals for the Seventh Circuit stated (178 F.2d at 308-09):

> "That case was decided in 1920, which was before the general abandonment of the old rule of non-liability where neither direct nor indirect privity existed. It is barely possible that had the court passed upon the question now before us, it might have upheld the old

rule, even though weighted down with many exceptions. However, as there are no controlling Iowa decisions on the precise question before us for decision, we feel that we should not attribute to Iowa a doctrine that has been repudiated by most jurisdictions; we feel justified in concluding that the Supreme Court of Iowa would today adopt the modern rule, which is well expressed in Restatement of the Law of Torts, Sec. 395: 'A manufacturer who fails to exercise reasonable care in the manufacture of a chattel which, unless carefully made, he should recognize as involving an unreasonable risk of causing substantial bodily harm to those who lawfully use it for a purpose for which it is manufactured and to those whom the supplier should expect to be in the vicinity of its probable use, is subject to liability for bodily harm caused to them by its lawful use in a manner and for a purpose for which it is manufactured.'"

See also *General Motors Corp. v. Johnson*, 137 F.2d 320 (C. A. 4th 1943); *International Derrick & Equipment Co. v. Croix*, F.2d (C. A. 5th, Feb. 13, 1957).

Of course it is not necessary that a case be explicitly overruled in order to lose its persuasive force as an indication of what the law is. A decision may become so overloaded with illogical exceptions that by erosion of time it may lose its persuasive or binding force even in the inferior courts of the same jurisdiction. And where, as in *Ford Motor Co. v. Myers*, the Supreme Court of Mississippi, twenty or thirty years ago, applied an old rule which has since been generally discredited elsewhere, it is relevant to consider what the Supreme Court of Mississippi has subsequently said on the point. See "Note on the Ways of Ascertaining State Law," Hart & Wechsler, The Federal Courts and the Federal System 628-30 (1953). We think that appellant herein rightly stresses the importance

of *E. I. DuPont deNemours & Co. v. Ladner*, 221 Miss. 378, 73 So.2d 249 (1954). In that very recent case, the Supreme Court of Mississippi was able to dispose of the particular issue on another ground without the necessity of expressly overruling its earlier decision in *Ford Motor Co. v. Myers*. But the court did take occasion, in a long and careful opinion, to indicate its awareness of the modern trend in the area, including the decision of the Supreme Judicial Court of Massachusetts in *Carter v. Yardley & Co. Ltd.*, supra; it stated that, whatever may have been the rule originally, "the principle seems now to be well established by the decisions of many courts that a person who has had no direct contractual relations with a manufacturer may nevertheless recover from such manufacturer for damages to property caused by the negligence of the manufacturer in the same manner that such a remote vendee or other third person can recover for personal injuries." (73 So.2d at 254). And it quoted, with apparent approval, many more recent authorities in support of the "modern doctrine." (Ibid) We think it is fair to infer from this latest expression by the Supreme Court of Mississippi that it is prepared to reconsider and revise the rule it applied in *Ford Motor Co. v. Myers* whenever it may have before it a case that squarely presents the issue. We have no doubt that when this occasion does come to pass, the Supreme Court of Mississippi will declare itself in agreement with the more enlightened and generally accepted modern doctrine.

A judgment will be entered vacating the order of the District Court, dismissing the complaint and remanding the case to the District Court for further proceedings not inconsistent with this opinion.

Hartigan, Circuit Judge (concurring). I concur in the opinion of the court but I am constrained to comment briefly. We were informed in oral argument by counsel for

the appellee that the district court in deciding this case had before it both the *Ford* and the *DuPont* decisions. Moreover, the district court knew from the official Mississippi report that the *MacPherson* case, then approximately twelve years old, had been considered and rejected by the Mississippi Supreme Court sitting in the *Ford* case. Therefore, "reluctantly" Judge Day adopted the *Ford* holding since it, as the only binding and conclusive statement of Mississippi law on the issue, had not been expressly modified or overruled. Certainly the existence of the *Ford* case presented to the trial judge a question different from that in the *Larrabee* case, cited in the opinion of the court today, where there was no controlling Iowa decision on the precise question in issue.

We, however, have inferred from pure dicta in the *DuPont* case and from the status of the law elsewhere on this issue that Mississippi is prepared to discard the *Ford* rule and adopt the modern rule. I believe this is a sound inference since the dicta in the *DuPont* case, though not expressly mentioning *Ford*, is sufficiently clear and the *Ford* rule is sufficiently outdated. Yet, in doing so I realize that we present a difficult problem for district judges when they must apply the *Erie* doctrine to situations wherein the considerations as between conflicting holdings and dicta are not as clearly defined as they are here. The question of how clear dicta must be to prevail over a prior controlling decision does not lend itself to easy solution.